COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY

APPEALS COURT
No. 2020-P-0466

COMMONWEALTH,
Appellee

v.

ROWEN D. LOWERY,
Appellant

BRIEF FOR THE APPELLANT
ON APPEAL FROM THE MIDDLESEX COUNTY SUPERIOR COURT

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STATEMENT OF THE CASE

In March of 2016 a Middlesex County Grand Jury returned two indictments against Rowen Lowery ("Lowery") charging him with trafficking of persons for sexual servitude (G.L. c. 265, §50(a)) and possession with intent to distribute marijuana (G.L. c. 94C, §32C(a))[A/I/25-27].[1] A jury trial was held on the indictments before Judge Elizabeth Fahey from April 17, 2019 until April 22, 2019. Lowery was found guilty of trafficking of persons for sexual servitude and guilty of the lesser included offense of possession of marijuana [19/157-58].

On the conviction for trafficking of persons for sexual servitude, Lowery was sentenced to not more than six years, and not less than five years at M.C.I. Cedar Junction [22/14]. On the conviction for possession of marijuana, Lowery was sentenced to probation for two years, from and after the other sentence [22/14]. A notice of appeal was filed on April 26, 2019 [A/I/34] and the case was docketed in this Court on March 23,

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[1] References to the record on appeal are as follows: to the trial by [date in April, 2019/Page](as all volumes are numbered "Volume 1 of 1"), to the motion to suppress hearing of August 11, 2017 as [MTS/Page], to the pre-trial hearing of April 10, 2019 as [PTH/Page], to the addendum as [Add/Page] and to the record appendix by volume as [A/I/Page] or [A/II/Page].

2020.

STATEMENT OF FACTS

Lieutenant Brian McManus ("McManus") of the Woburn police department was commander of the Southern Middlesex Regional Drug Task Force on July 31, 2015 [18/173]. He was the supervisor of an operation that day to identify individuals involved in human trafficking, and he was acting as an undercover officer [18/173-74]. He started his investigation with an online search on Backpage.com for commercial sexual services being offered in the Woburn area [18/174].

He found an advertisement with a telephone number and communicated with the number by voice calls and texts at approximately 3:00 P.M. [18/176]. When he received a response he tried to set up a date acting as a john to pay for sex [18/176]. He made arrangements to meet with the person at the Red Roof Inn in Woburn [18/177]. The police had rented adjoining rooms to use for the operation [18/177]. He arranged with a woman named Passion to come to the room for a full hour service [18/178].

Passion arrived at his room shortly after 6:00 P.M. and was by herself, and McManus was the only other person in the room. [18/179]. McManus discussed with

her the nature of the acts to be performed and the price [18/180]. They agreed on a price of $260 for oral sex [18/180]. He gave her the cash he obtained from the undercover funds that his department provided [18/180-81]. Passion began texting on her cell phone after he gave her the money and then was staring at the phone before she put it down [18/182-84]. McManus told her that he did not have a condom, so she produced one from her back pocket and began to open it while lowering herself in front of him [18/184].

At that point McManus gave a signal for assisting officers to enter from the adjoining room with a shared door [18/184-85]. Other officers identified themselves and McManus left the room [18/185].

Sergeant John Walsh ("Walsh") of the Woburn police department was in the adjoining room and entered when he heard the signal from McManus [18/109]. He identified himself as a police officer and asked Passion to sit down [18/111]. He was in plain clothes, had a badge around his neck and did not have his weapon drawn when he entered the room [18/111]. He learned that Passion's real name was T.D.[2] [18/112].

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[2] The alleged victim's name is redacted and initials used pursuant to G.L. c. 265, §24C.

Walsh read T.D. her *Miranda* rights and then they conversed [18/112]. Walsh noted T.D. was sad and crying [18/112]. The only items that T.D. had on her person were a cell phone and the $260 that McManus had given her [18/113-15]. The only item recovered from the room was a Lifestyle brand condom [18/116-17].

Detective Angelo Piazza ("Piazza") of the Woburn police department was involved in this investigation and was assigned to outside surveillance with other officers at the Red Roof Inn [18/30]. He was informed that the person that McManus was going to meet would arrive at the hotel at approximately 6:00 P.M. [18/38-39]. He observed a grey Dodge Charger enter the parking lot at that time and could see that there was a male driver and a female passenger [18/39].

After a few minutes he saw the car leave the parking lot of the hotel and pull out onto Commerce Way [18/41]. Piazza followed the car for a few minutes and then pulled it over in the area of 90-110 Commerce Way [18/42]. He identified the driver of the car as Lowery and there was no one else in the car [18/43,140]. Lowery was arrested and the car was towed to the Woburn police department and then searched [18/44]. Piazza noted that when Lowery was booked he had two hotel keys

in his possession [18/56].

Walsh was also involved in the inventory search of the Dodge Charger [18/43,117]. In the car he found 1)packages of marijuana in a backpack in the trunk; 2) five cell phones recovered from the passenger compartment [18/118-19]; 3) Mass ID cards for two different females in the trunk and the passenger compartment [18/119]; 4)two business cards for "Independent Entertainment Services" in the center console; 5) a rental car agreement in the glove box [18/120-21]; 6)business cards for various men's entertainment clubs in the passenger compartment [18/122]; 7)an empty box of Lifestyle condoms, additional condoms and lubricating gels from a brown purse on the front passenger seat [18/122-24]; and 8)a temporary Mass ID for T.D. in the passenger compartment [18/125].

McManus applied for and was granted a search warrant for the five cell phones recovered from the car and the cell phone that T.D. had on her person [18/187]. He did an analysis of the data extracted from each phone [18/187]. There was some sexual terminology contained in the texts between T.D. and Lowery [18/195-205, 19/52]. Other texts had references

to marijuana [19/46,51-52].

The packages of marijuana found in the backpack were tested at the State Police Crime Laboratory and determined to be marijuana [19/65,73]. Three of the four bags from one package were weighed and contained 34.02 grams, and three of the six bags in another package were weighed and contained 6.77 grams [19/73].

T.D. testified at trial under a grant of immunity [18/64]. She stated she was close friends with Lowery in 2015 and he was not her pimp [18/66,87,90]. She created her advertisement on Backpage.com and used her cell phone to make arrangements with Lieutenant McManus [18/80,83].

On the day in question Lowery gave her a ride to the hotel but he did not regularly give her rides [18/73,84]. She did not give him any money to drive her to the hotel and did not use her cell phone to communicate with him from the hotel room [18/80,89]. She did not tell Lowery what she was going to do at the hotel and he had no knowledge of it [18/73,88].

SUMMARY OF ARGUMENT

1. There was no preliminary determination made by the judge by a preponderance of the evidence that a joint venture existed independent of the statements seeking

to be admitted, or that the statements were made during the pendency of the joint venture and in furtherance of its goals. The judge abused her discretion when she allowed statements from T.D. into evidence as she was not a co-conspirator or joint venturer in the crime of sex trafficking, as the prosecutor portrayed her as a victim throughout the trial. In addition, the jury was allowed to consider T.D.'s statements as to Lowery's guilt without being instructed that they had to find by a preponderance of the evidence that there was a joint venture, independent of the statements [Pgs.17-27].

2. Lowery's motion to suppress the content of six cell phones should have been allowed because the police had no reasonable expectation that the items sought, the phone calls or text messages, would be located in the five cell phones from Lowery's car. There was nothing in the affidavits that T.D. was communicating with Lowery at the time of the incident, and he was not seen talking or texting on the phone [Pgs.27-34].

3. The judge abused her discretion by allowing McManus to testify as an expert witness as the prosecutor violated the rules of discovery by not giving notice of an expert. The dual role of McManus as an expert and a percipient witness likely implied to the jury that in

his opinion, Lowery fit all the characteristics of a person engaged in sex trafficking [Pgs.34-41].

4. The judge abused her discretion by allowing into evidence text messages from up to six weeks before the incident. The prior bad act evidence overwhelmed the evidence regarding the charged act and distracted the jurors from the question of whether Lowery committed the crimes [Pgs.41-46].

5. The judge abused her discretion when she allowed police witnesses to use the terminology "child exploitation task force" and continued use of the word "victim". She overruled objections by trial counsel even after she had ruled, and the prosecutor had stated, that this terminology would not be used [Pgs.46-50].

6. The prosecutor improperly stated during her closing argument, over objection, that "[h]e knew she was vulnerable, and he took advantage of her. He preyed on her, and he put her to work". The comments were not a fair inference from the evidence and were intended to appeal to the jury's sympathy and emotions [Pgs.50-55].

I. THE JUDGE ABUSED HER DISCRETION WHEN SHE ALLOWED THE COMMONWEALTH'S MOTION IN LIMINE TO ADMIT STATEMENTS OF T.D. AS A CO-CONSPIRATOR.

The prosecutor filed "Commonwealth's Motion in

Limine to Admit Statements of Co-Conspirator" seeking to admit "1)a Backpage.com [advertisement] advertising sexual services, see Attachment A; 2)text message conversations between T.D. and the defendant regarding their business, see Attachments B-P; and 3)statements made by T.D. soliciting fees for sexual conduct from an undercover police officer." [A/II/82-139]. A hearing was held on this motion on April 10, 2019, a week before the trial commenced. The judge allowed the motion [PTH/17].

A. The judge abused her discretion by admitting T.D.'s statements without making a preliminary finding by a preponderance of the evidence that a joint venture existed independent of the statements.

During the discussion on this motion on April 10, 2019, the judge heard arguments of counsel and then made a decision [PTH/8-17]. The judge simply stated "[s]o I'm allowing this motion to admit statements of the joint venturer" [PTH/17]. There is no testimony taken during the hearing. Trial counsel informs the judge "I think you have to make a preliminary communication (sic) that it's Lowery and T.D. that are making the communications and then whether the communications are during the pendency of the effort, and whether they're in furtherance of the goal"

[PTH/11]. The judge did not respond to the statement, only asking the prosecutor whether T.D. had been indicted [PTH/11]. Due to trial counsel's opposition to the prosecutor's motion in limine prior to trial, this issue is preserved for appellate review even without further objection at trial. *Commonwealth v. Grady*, 474 Mass. 715, 719 (2016).

In *Commonwealth v. Holley*, 478 Mass. 508, 534 (2017), the Supreme Judicial Court stated:

> 'We recognize, as an exception to the hearsay rule that a statement made by a coconspirator or joint venturer may be admitted for its truth against the other coconspirators or joint venturers.' *Commonwealth v. Mattier*, 474 Mass. 261, 276-277, 50 N.E. 3d 157 (2016), *citing Mass G. Evid.* §801 (d)(2)(E)(2016). To admit such evidence, *a court must find*, by a preponderance of the evidence, the existence of a joint venture independent of the statement being offered. *Commonwealth v. Rakes*, 478 Mass. 22, 37, 82 N.E. 3d 403 (2017).

Holley, supra at 534 (emphasis supplied); *Commonwealth v. Bright*, 463 Mass. 421, 426 (2012); *Commonwealth v. Cruz*, 430 Mass. 838, 844 (2000). Another requirement for admissibility is a determination by the judge that such statements were made "both during the pendency of the cooperative effort and in furtherance of its goal". *Commonwealth v. White*, 370 Mass. 703, 708-09 (1976), *citing Commonwealth v. Chapman*, 345 Mass. 251, 255 (1962).

There was no preliminary determination made by the judge here that a joint venture existed independent of the statements seeking to be admitted, or that the statements were during the pendency of the joint venture and in furtherance of its goals. It seems clear that the judge viewed the texts that the prosecutor was attempting to introduce ("[s]o what you're trying to offer are the text messages that are in yellow, attached to -" [PTH/9]). There was no evidence taken as to whether the joint venture existed independent of the statements, which would have been difficult to prove without the texts messages (see Argument C, *infra*).

Appellate courts review decisions of the trial judge on the admissibility of evidence for abuse of discretion. *Commonwealth v. Sharpe*, 454 Mass. 135, 143 (2009). The judge abused her discretion when she allowed the prosecutor's motion without first making the appropriate findings. The judge's ruling resulted from "'a clear error of judgement in weighing' the factors relevant to the decision...such that the decision falls outside the range of reasonable alternatives" *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014)(citations omitted).

B. Even if this Court finds that the judge made a proper preliminary finding, T.D.'s statements were not admissible because she was not a co-conspirator or joint venturer in either charged crime.

The prosecutor's motion in limine stated that T.D. was in an "ongoing conspiracy with the defendant to obtain fees for sexual conduct..." [A/II/82] and that T.D. "and the defendant were engaged in a conspiracy to sell sex" [A/II/85]. Obtaining fees for sexual conduct is what the facts of the case would indicate T.D. did, which is prostitution.

T.D. was not a co-conspirator or joint venturer in the crime of sex trafficking. In order to be a joint venturer, the prosecutor must prove that she "knowingly participated in the commission of *the* crime charged... with the intent required for that offense" *Commonwealth* v. *Zanetti,* 454 Mass. 449, 466 (2009), *Commonwealth v. Bright*, 463 Mass. 421, 435 (2012). She did not participate in the crime of sex trafficking or possession with intent to distribute a Class D substance, as those were the crimes charged. She was never charged with a crime in this case, but was granted immunity by the judge for her testimony [18/7].

She was not a joint venturer in either crime because, as the prosecutor presented the case at trial,

she was a victim of sex trafficking(there was no evidence presented that she was involved in the sale of drugs). Detective Piazza during his testimony stated that part of his training was to identify "victims" of sex trafficking [18/25,26,29](objected to by trial counsel[18/27,29], see Issue V, *infra*). During Sergeant Walsh's testimony, he stated that he worked "closely with the FBI Child Exploitation Task Force, which their mission is to recover victims of human trafficking." [18/106](objected to by trial counsel, see Issue V, *infra*).

In addition, in her closing argument, the prosecutor repeatedly told the jury about the "control" that Lowery had over T.D. [19/104-105]. She stated "[h]e had another product he was selling that day, and that product was T.D." [19/99-100]. She also stated "[h]e was her pimp, and she was his product" [19/104]. She told the jury that she was only 18 and he was 34, that "she was vulnerable, and he took advantage of her. He preyed on her, and he put her to work" [19/106](objected to by trial counsel, see Issue VI, *infra*).

The prosecutor cannot have it both ways. Before the trial the prosecutor argued that T.D. was a joint

venturer, but at trial she argued that T.D. was a victim. T.D.'s statements should not have been admitted against Lowery as she was not a joint venturer in either charged crime.

Since she was not a joint venturer, any statements made by her and admitted against Lowery would be hearsay. Such statements would only be admissible if she was a joint venturer, and then would be admissible as not being hearsay under the Massachusetts Guide to Evidence as "made by the party's coconspirator or joint venturer during the cooperative effort and in furtherance of its goal, if the existence of the conspiracy or joint venture is shown by evidence independent of the statement" *Mass. G. Evid.* §801 (d)(2)(E)(2018).

Trial counsel objected when the prosecutor moved to admit text messages from T.D. for a number of reasons, and at least twice on the basis that they were hearsay [1/94,190]. Due to trial counsel's opposition to the prosecutor's motion in limine prior to trial [PTH 10-11], this issue is preserved for appellate review even without further objection at trial. *Commonwealth v. Grady*, 474 Mass. 715, 719 (2016).

Appellate courts review decisions of the trial

judge on the admissibility of evidence for abuse of discretion. *Commonwealth v. Sharpe*, 454 Mass. 135, 143 (2009). The judge abused her discretion by allowing the prosecutor's motion. The judge's ruling resulted from "'a clear error of judgement in weighing' the factors relevant to the decision...such that the decision falls outside the range of reasonable alternatives'" *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014)(citations omitted).

C. The judge's failure to instruct the jury that they could consider T.D.'s statements as bearing on Lowery's guilt only if they made certain findings created a substantial risk of a miscarriage of justice.

The judge never instructed the jury as to their consideration of the text messages and statements of T.D.. "Before considering the statement as bearing on the defendant's guilt, however, the jury must make 'their own independent determination, again based on a preponderance of the evidence other than the statement itself, that a joint venture existed and that the statement was made in furtherance thereof.'" *Holley, supra* at 534, *citing Rakes*, supra at 37; *Bright*, supra at 426.

The first case in the Commonwealth to require that the jury be instructed on the statements of a

coconspirator was *Commonwealth v. Beckett*, 373 Mass. 329, 340 (1977), and later cases have reiterated the requirement. *See Bright, supra* at 429 ("a necessary condition of admissibility"). In *Commonwealth v. Cartagena*, 32 Mass. App. Ct. 141, 144 (1992), this Court stated that "[w]hen hearsay statements of an alleged joint venturer are to be used against a defendant, the jury should be instructed that they may consider the statements only if they determine on the basis of independent nonhearsay evidence that a joint venture existed", *citing Beckett, supra*, at 340, and *Commonwealth v. Soares*, 384 Mass. 149, 159-60 (1981). *See Massachusetts Superior Court Criminal Practice Jury Instructions*, §6.3.2, MCLE, Second Edition (2013).

Trial counsel did not request the instruction, or lodge an objection after the judge's final instructions [19/139]. The prosecutor also did not request the instruction. Lowery will have to show that the failure to give the instruction created a substantial risk of a miscarriage of justice. *Commonwealth v. Freeman*, 352 Mass. 556, 564 (1967).

In *Holley, supra*, the Supreme Judicial Court found that the failure of the judge to make a preliminary determination or to instruct the jury was not

reversible error as it did not prejudice the defendants. The Court stated that the prosecutor had "introduced overwhelming, independent, nonhearsay evidence establishing the existence of a joint venture..." *Id.* at 535.

That was not the case here. The testimony at trial (since there was no preliminary hearing we can only assess the trial testimony), other than the statements, was that Lowery dropped T.D. off at the hotel. He was not seen talking on a cell phone. Lieutenant McManus only communicated with T.D. when setting up the meeting with her to pay for sex.

T.D. testified at trial that Lowery was not her pimp and she did not communicate with him from the hotel room [18/80,87,90]. She testified Lowery was her friend and did not give him any money to drive her to the hotel [18/86,89]. She also testified that she did not tell Lowery what she was going to do at the hotel and he had no knowledge of it [18/73,90]. The only articles in the car that would have indicated that she was in the process of having sex for money came from inside her purse on the front passenger seat [18/122-24].

The jury was allowed to consider T.D.'s statements

as to Lowery's guilt without being instructed that they had to find by a preponderance of the evidence that there was a joint venture independent of the statements. Consequently, the failure of the judge to give the required instruction created a substantial risk of a miscarriage of justice. *Commonwealth v. Grandison*, 433 Mass. 135, 142 (2001).

The judge's decision on the motion, her failure to make a preliminary determination of admissibility or to instruct the jury on the issue denied Lowery his right to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article Twelve of the Declaration of Rights of the Massachusetts Constitution. *Green v. Georgia*, 442 U.S. 95,97 (1979), *In Re Murchison*, 349 U.S. 133, 136 (1955).

II. THE JUDGE'S DENIAL OF LOWERY'S MOTION TO SUPPRESS WAS ERROR AS THERE WAS NO PROBABLE CAUSE SHOWN IN THE AFFIDAVITS IN SUPPORT OF THE SEARCH WARRANTS FOR SIX CELL PHONES.

Lowery filed "Defendant's Motion to Suppress Evidence seized via Search Warrant, and Memorandum in Support" {A/II/3-10].[3] He thereafter filed

[3] A copy of the search warrant and return were not in trial counsel's file. Appellate counsel was unable to gain access to the Middlesex County Courthouse due to the pandemic to obtain a copy of

"Defendant's Supplemental Memorandum in Support of his Motion to Suppress" [A/II/11-14]. The prosecutor filed "Commonwealth's Opposition to Defendant's Motion to Suppress Evidence seized via Search Warrants", which contained six affidavits in support of the warrants (Exhibits A-F) [A/II/15-81]. After an non-evidentiary hearing on March 22, 2018, the judge issued a Decision and Order denying the motion [Add/65-69][A/II/28-32].[4] This issue is preserved for appellate review even without an objection to the evidence at trial. *See Commonwealth v. Whelton*, 428 Mass. 24, 26 (1998)(denial of motion to suppress reviewable without further objection at trial).

However, trial counsel did object to the admission of the evidence during the trial numerous times [18/189-90,19/29-31,45,47,50]. The argument below coincides with Argument 3 in "Defendant's Supplemental Memorandum in Support of his Motion to Suppress" [A/II/13], which trial counsel stated at the hearing

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those documents or to view the exhibits in the case.

[4] Lowery filed an additional motion to suppress concerning the stop and search of his vehicle, and there was an evidentiary hearing on that motion on August 11, 2017. Lowery is not arguing the correctness of the denial of that motion in this appeal.

was "the better of the two" memorandums [MTS/9].

The standard of review in suppression matters is well settled. The appellate court will accept the judge's findings of fact in the absence of clear error and will defer to his or her assessment of the credibility and weight of the testimony. *See, e.g.*, *Commonwealth v. Gentile*, 437 Mass. 569, 573 (2002). "However the appellate court must conduct an independent review of the ultimate findings and conclusions of law of the motion judge so as to assure the correctness of the application of constitutional standards to facts found" *Commonwealth v. Ramos*, 72 Mass. App. Ct. 773, 777 (2008), *citing Commonwealth v. Scott*, 440 Mass. 642, 646 (2004).

All six affidavits contain the same information [A/II/23-81]. The only facts from the affidavit that could be used to find probable cause to search the phones were 1) that "Ms. T.D. took possession of the money and immediately began to type on her cell phone. T.D. stared at the screen and appeared to receive a message, which prompted her to begin the session" [A/II/24]; 2) "T.D. stated that she pays Mr. Lowery to drive her to these commercial sexual activity appointments ..."[A/II/24]; 3) five cell phones were

recovered from the vehicle Lowery was driving [A/II/25];4) "the phones that were powered on received multiple calls during a short period" [A/II/26]; and 5) general background information on sex trafficking and cell phone usage [A/II/26-28].

This did not provide probable cause to search all the phones. There is nothing in the affidavits stating that T.D. told Lieutenant McManus that she was texting Lowery or that he was texting her, and McManus had no knowledge of who she was texting. There is no statement that Lowery was observed using his cell phone at any time while police had him under "constant surveillance" [A/II/25].

There may have been probable cause in the affidavit (Exhibit E [A/II/63-71]) to search T.D.'s phone. This would be based on the fact that her phone number was the one from her advertisement and the phone number that was used to communicate with McManus, and also that she was using it in the hotel room. Even assuming, without admitting, that there was probable cause to search T.D.'s phone, the police should have applied for a search warrant for her phone, and then used the records to determine the number she was communicating with from the hotel room and applied for

a search warrant for that phone. In short, there is nothing in the affidavits that links T.D.'s phone to any of the phones found in Lowery's vehicle.

There have been a number of cases in the last several years concerning probable cause to search cell phones. This Court and the Supreme Judicial Court have found, in a number of cases, that the information provided in an affidavit did not furnish probable cause to search the phone. *See Commonwealth v. White*, 475 Mass. 583, 592 (2016)(no particularized information provided establishing existence of evidence likely to be found on phone); *Commonwealth v. Broom*, 474 Mass. 486, 495 (2016)(same); *Commonwealth v. Jordan*, 91 Mass. App. Ct. 743, 751 (2017)(no connection between the defendant's use of his cellular telephone and his involvement in the crime).

In fact, the Supreme Judicial Court has stated that "information that an individual communicated with another person, who may have been linked to a crime, without more, is insufficient to establish probable cause to search either individual's cellular telephone" *Commonwealth v. Morin*, 478 Mass. 415, 426 (2017). The Court stated that calls between two co-defendants before and after a killing established a personal

relationship between them, and even though important in the investigation, was not probable cause to search the phone. *See Commonwealth v. Fulgiam*, 477 Mass. 20, 34 (2017)(telephone contact between defendant, co-defendant and victim only established relationship and was not enough for probable cause).

In this case we do not even have communication between T.D. and Lowery as part of the affidavit. Lieutenant McManus did not know who T.D. was communicating with from the hotel room. In fact, the judge asked the prosecutor at the hearing on the motion whether the affidavit contained the phone number "[t}hat she was texting" and the response was "no. That link between the two was not provided" [MTS/12].

In her written decision, the judge only writes two sentences on page 4 of her decision [Add/68][A/I/31] as to her finding that there is probable cause for a search of all the phones. She states the affidavit has "specific information linking the defendant to sex trafficking..." but the affidavit needs to have more information as to how all these phones are involved in the crime. Her statement following concerning the use of a cell phone in the undercover incident, and the Backpage.com ad again concern T.D.'s phone, and, as

previously stated, there is nothing linking her cell phone to any of the cell phones in the vehicle.

The Supreme Judicial Court has stated "the affidavit must demonstrate that there is a reasonable expectation that the items sought *will* be located in the particular data file or other specifically identified electronic location that is to be searched" (emphasis in original), *Broom, supra* at 496. The police had no reasonable expectation that the items sought here, phone calls or text messages, would be located in the five cell phone from Lowery's car as there was nothing in the affidavit that T.D. was communicating with him at the time of the incident, and he was not seen talking or texting on the phone.

The question now turns to whether the erroneous denial of Lowery's motion to suppress was harmless beyond a reasonable doubt. The text messages were central to the prosecutor's case. The texts were the entire case against Lowery. T.D. testified that Lowery did not know what she was doing in the hotel and was not her pimp (see Argument I, *supra*), so there was no other evidence that he was guilty of sex trafficking except the texts.

In the prosecutor's opening statement, she told

the jury that the text messages recovered from the phones would "depict an ongoing trade for sex..." [18/18]. In her closing argument, she stated that Lowery's phone "is a very important part of this case" and that it "tells you what he knew and what he intended"[19/96,97,99]. She quoted some of the texts on six of the twelve pages of her closing argument [19/97,98,101,102,103,105]. The erroneous denial of the motion to suppress was not harmless beyond a reasonable doubt. *Compare Morin*, *supra* at 428-29 (text messages were central to Commonwealth's case and emphasized throughout the trial); *Contrast Broom*, *supra*, at 497-98 (no error due to limited nature of use of text messages).

Any evidence seized during the execution of the search warrants for the six cell phones should be suppressed as it was obtained in violation of Lowery's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article Fourteen of the Declaration of Rights of the Massachusetts Constitution. *Illinois v. Gates*, 462 U.S. 213, 246 (1983), *Coolidge v. New Hampshire*, 403 U.S. 443, 502 (1971).

III. LOWERY WAS DENIED A FAIR TRIAL WHEN THE JUDGE ALLOWED LIEUTENANT MCMANUS TO TESTIFY BOTH AS AN

EXPERT AND AS A PERCIPIENT WITNESS.

A. McManus should not have been allowed to testify as an expert because the prosecutor failed to comply with the rules of discovery.

At the beginning of Lieutenant McManus' testimony, trial counsel objected on the basis that McManus would be giving expert testimony and he had no notice that any expert witnesses were going to be called [18/151]. The judge agreed and stated there was no notice of an expert, that it should have been disclosed, and that the prosecutor "dropped the ball" [18/151,153,154]. The judge indicated that he would allow the prosecutor to have some "common sense things" and not much else [18/153]. The judge stated "this is expert testimony" but says she will "permit it, reluctantly", [18/162] apparently because some of the information was in the police report and therefore trial counsel was not "surprised" [18/159].

Trial counsel objected numerous times after this discussion to McManus' testimony concerning sex trafficking, and the judge sustained his objections twice [18/169,171], and overruled them many times [18/167,170,171,203,205][19/52]. Later he objected to McManus's expert testimony concerning text messages referencing marijuana, and the objections were

overruled [19/45,47,51]. Due to trial counsel's numerous objections, this issue is preserved for appellate review. *Commonwealth v. Perryman*, 55 Mass. App. Ct. 187, 192 (2002).

Rule 14 of the Massachusetts Rules of Criminal Procedure governs the discovery of experts to be called as witnesses and the sanctions for noncompliance. Section (a)(1)(A)(vi), under the heading of "Mandatory discovery for the defendant", states that the prosecution shall disclose intended expert opinion evidence. Section (c)(2) of the rule states that the judge may exclude evidence for noncompliance with the rule.

"Under rule 14 (c), a judge can impose a variety of sanctions on the Commonwealth for failure to comply with pretrial discovery rules" *Commonwealth v. Firth*, 458 Mass. 434, 442 (2010). "As we have stated, sanctions pursuant to rule 14 (c) are designed to protect a defendant's right to a fair trial" *Id.* at 442.

The case of *Commonwealth v. Chappee*, 397 Mass. 508, 517-518 (1986), discusses five factors to be used by a judge in determining whether to exclude a witness for violation of a discovery order. The factors are

"1)the prevention of surprise; 2)the effectiveness of sanctions less severe than exclusion; 3)evidence of bad faith; 4)the prejudice to the other party caused by the testimony ; and 5) the materiality of the testimony to the outcome of the case", *Id.* at 518. *See also Commonwealth v. Giontzis*, 47 Mass. App. Ct. 450, 460 (1999)(judge limited scope of testimony from Commonwealth's rebuttal expert witness where Commonwealth failed to disclose witness before trial).

In reviewing these factors in the present case, there was surprise, except for, as the judge stated, a reference in the police report that T.D. had no money or identification on her person at the time [18/155]. Second, exclusion of McManus' testimony as an expert was the only effective option. The judge did not limit McManus' testimony at all, as pointed out above, only sustaining trial counsel's objections two times out of the numerous objections made. Exclusion would have also prevented McManus from testifying as a expert and percipient witness, as discussed in Section B, *infra*.

Third, there was evidence of bad faith on the part of the prosecutor. The judge repeatedly told her that McManus' testimony was expert testimony, even though

she insisted that it was not [18/152-54]. The judge told the prosecutor that she "dropped the ball" [18/154].

There was certainly prejudice to Lowery by the admission of the expert testimony. Among other things, McManus was able to improperly testify about organizations for victims of sex trafficking, the relationship of a pimp and a prostitute, the significance of items recovered from the vehicle Lowery was driving, and the significance of words contained in the text messages. In addition, the testimony by McManus as an expert prevented trial counsel from fully preparing for expert testimony.

Finally, the outcome of the case was affected by his testimony. McManus was able to discuss terminology in the texts, which were improperly admitted (see Issues I, *supra*), and told the jury that the evidence indicated that Lowery was a pimp [18/171]. The evidence of guilt of sex trafficking was not overwhelming. The Commonwealth's entire case was based on the text messages. The only other evidence was that Lowery dropped T.D. off at the hotel. T.D.'s testimony did not implicate Lowery in sex trafficking in any way. The judge should have precluded McManus' testimony as

an expert witness, and limited his testimony to his role as a percipient witness.

B. The judge abused her discretion by allowing McManus to testify as an expert and as a percipient witness.

Trial counsel objected to McManus' testimony on an additional basis that he was testifying as an expert and as a percipient witness [18/151,160]. The judge responded to trial counsel that "I don't think it's required" that another officer has to be the expert, and allowed McManus to testify in both roles [18/160]. Due to trial counsel's objection this issues is also preserved for appellate review. *Commonwealth v. Comtois*, 399 Mass. 668, 674 (1987).

This Court has cautioned against the use of the same witness as both an expert and a percipient witness. *Commonwealth v. Velasquez*, 78 Mass. App. Ct. 660, 667 (2011), *Commonwealth v. McCaffrey*, 36 Mass. App. Ct. 583, 591 (1994). "A percipient police witness may also testify as an expert witness, though care should be taken in presenting such expert testimony: 'It is easy for the line between specific observations and expert generalizations to become blurred in these situations'" *Commonwealth v. Ortiz*, 50 Mass. App. Ct. 301, 306-307 (2000), *citing Commonwealth v. Tanner*, 45

Mass. App. Ct. 576, 579 (1998) ("...the practice should best be avoided").

The fact that McManus was permitted to testify as a percipient witness to the alleged crime and the facts as they related to Lowery, and as an expert in the field of sex trafficking, was an abuse of discretion. This is true because whether or not Lowery was guilty of sex trafficking was the sole point of contention in the case (other than the drugs). The dual role of McManus' testimony likely implied to the jury that in his opinion, Lowery fit all the characteristics of a person engaged in sex trafficking.

The ultimate issue in the case, whether Lowery was involved in sex trafficking, was for the jury to decide. McManus' dual role did more than touch on the ultimate issue - he stated there was a direct correlation between the facts of this case and the known characteristics of sex traffickers. His testimony unquestionably invaded the province of the jury. "When the evidence comes from the mouth of a police expert witness, and so bears an official imprimatur, the likelihood for prejudice is great" *Tanner*, *supra*, at 581.

The judge abused her discretion by allowing

McManus to testify in both roles. The judge's ruling resulted from "'a clear error of judgement in weighing' the factors relevant to the decision...such that the decision falls outside the range of reasonable alternatives" *Commonwealth v. Robertson*, 88 Mass. App. Ct. 52, 54 (2015).

The judge's decisions on sections A and B above denied Lowery his right to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article Twelve of the Declaration of Rights of the Massachusetts Constitution. *Chambers v. Mississippi*, 410 U.S. 284, 294-303 (1973); *Estes v. Texas*, 381 U.S. 532, 538-545 (1965).

IV. THE JUDGE ABUSED HER DISCRETION IN ALLOWING EXCESSIVE BAD ACT EVIDENCE TO BE INTRODUCED INTO EVIDENCE BY THE PROSECUTOR.

There was a discussion the first day of trial about the admission of text messages between T.D. and Lowery from six weeks prior to the incident to the day of the alleged crime [17/12-17].[5] The prosecutor argued that the texts were relevant to show Lowery's

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[5] The prosecutor filed "Commonwealth's motion in limine to admit text messages of the Defendant" that was argued and allowed prior to trial, but the only issue raised at that time was authentication [PTH/4-8].

knowledge [17/12-17]. The judge stated she was allowing the texts into evidence for that period [17/18-19]. Trial counsel objected to the texts for that period coming into evidence at the time of the discussion [17/12]. He also objected during the trial [18/94,19/40-41,44,46,48][6] and requested a contemporaneous instruction on prior bad acts [19/48]. This issue is therefore preserved for appellate review. *Commonwealth v. Gallison*, 383 Mass. 659, 669 (1981). Appellate courts review decisions of the trial judge on the admissibility of evidence for abuse of discretion. *See Commonwealth v. Sharpe*, 454 Mass. 135, 143 (2009)(prior bad acts).

The judge stated she would instruct the jury on prior bad acts prior to the introduction of evidence [18/8]. She did give the jury a contemporaneous instruction during the trial [18/95-96][19/49] and in her final instructions [19/125-126].

It is settled law that "the prosecution may not introduce evidence that a defendant previously has misbehaved, indictably or not, for the purposes of

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[6] There are so many objections by trial counsel concerning the admission of the text messages, and many without a statement of the basis of the objection, that appellate counsel has done his best to determine the basis of each objection.

showing his bad character or propensity to commit the crime charged, but such evidence may be admissible if relevant for some other purpose" *Commonwealth v. Woollam*, 478 Mass. 493, 500 (2017), *cert. denied*, 138 S. Ct. 1579 (2018), *quoting Commonwealth v. Helfant*, 398 Mass. 214, 224 (1986). Even if relevant, the evidence "will not be admitted if its probative value is outweighed by the risk of unfair prejudice to the defendant" *Commonwealth v. Crayton*, 470 Mass. 228, 249 (2014), *Commonwealth v. Anestal*, 463 Mass. 655, 665 (2012).

As the judge instructed the jury, they could consider the evidence "solely on the limited issue of this defendant's motive, intent, or proof of a pattern of conduct, a common scheme, or the defendant's identity, or whether the defendant acted intentionally and not because of some mistake, accident, or other innocent reason" [19/126]. *Helfant, supra* at 224, *Woollam, supra* at 500.

As one can see from the attachments to the "Commonwealth's Motion in Limine to Admit Statements of Co-Conspirator", the texts admitted into evidence started on June 15, 2015, about six weeks before the incident [A/II/87-139]. Many of them were had vulgar

sexual references [A/II/101,104,132] and others were admitted to generate sympathy for T.D. [A/II/99,118]. The prosecutor did not need all the these texts messages admitted into evidence to prove her case, and they are all long before the date of the incident. The prosecutor also alluded to and emphasized a number of these vulgar sexual references in her closing argument [19/103,104).

The amount of the prior bad act text messages admitted into evidence far exceeded the amount of text messages from the day of the incident. Many of the text messages admitted were an attempt to show Lowery had bad character, which is not permitted. *Crayton, supra* at 249.

The testimony of Lieutenant McManus (who was the undercover officer in the hotel room with T.D.) concerning what happened the day of the incident only covers about fourteen pages of the transcript [18/173-186]. However, his testimony concerning the text messages, which were almost all from dates before July 31, 2015, take up about eighteen pages of the transcript [18/195-96,202-205,19/27-30,45-52]. The prior text messages were a focus of the prosecutor's closing argument [19/97-99,101-105 (eight of the eleven

pages in the transcript)]. *See Commonwealth v. McMullin*, 91 Mass. App. Ct. 1106 (2017)(Unpub. Rule 1:28 order)(conviction of violation of abuse prevention order reversed - excessive prior bad act evidence was focus of prosecution's closing).

The judge warned the prosecutor about this when she stated she would instruct the jury on prior bad acts. She stated "[t]he rule from the SJC is that the prior bad act evidence can't overwhelm the indictable alleged conduct. So just keep that in mind. You can't have more pages in the transcript concerning what happened in the six weeks before on or about July 31" [18/8].

That is exactly what happened here. The bad act evidence overwhelmed the evidence regarding the charged act and distracted the jurors from the question of whether Lowery committed the crimes. "Any minimal value it may have had in adding to an understanding of the relationship was far outweighed by its prejudicial nature" *Commonwealth v. Almeida*, 42 Mass. App. Ct. 607, 612-13 (1997)(conviction for rape reversed due to evidence concerning defendant's role in procuring victim's abortion); *see also Commonwealth v. Dwyer*, 448 Mass. 122, 129 (2006)(rape conviction reversed -

complainant's testimony about seven uncharged incidents was excessive).

The judge abused her discretion by allowing it. The judge's ruling resulted from "'a clear error of judgement in weighing' the factors relevant to the decision...such that the decision falls outside the range of reasonable alternatives" *Commonwealth v. Robertson*, 88 Mass. App. Ct. 52, 54 (2015).

The admission of all the prior bad act evidence denied Lowery his right to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article Twelve of the Declaration of Rights of the Massachusetts Constitution. *Green v. Georgia*, 442 U.S. 95,97 (1979), *In Re Murchison*, 349 U.S. 133, 136 (1955).

V. THE JUDGE ABUSED HIS DISCRETION BY ALLOWING WITNESSES TO TESTIFY TO PREJUDICIAL TERMINOLOGY.

Pursuant to a motion filed by trial counsel entitled "Motion in Limine - Task Force" [A/I/33], there was a discussion of the issue prior to the start of the trial. The motion sought to prohibit the Commonwealth witnesses from referring to the "FBI Child Exploitation Task Force". The prosecutor stated that "[s]o I will instruct my officers that while they may refer to the fact that there were FBI agents present to

assist with the operation, they should not refer to the fact that those FBI officers were from the Child Exploitation Task Force" [17/5]. She also told the judge that "to have that language in the trial would be confusing and prejudicial" [17/5]. The judge allowed trial counsel's motion [17/5].

However, during the testimony of Sergeant Walsh, he testified "I also work closely with the FBI Child Exploitation Task Force, which their mission is to recover victims of human trafficking" [18/106]. Trial counsel objected, and inexplicably, the judge overruled the objection [18/106].

In addition, during the testimony of Detective Piazza, he uses the word "victim" five times. The first two are not objected to [18/25], but the third time trial counsel asks for s sidebar and he told the judge that it is the third time the word "victim" has been used [18/27]. The judge stated that "[t]his is the first time I've heard it, but I'm not denying that - I'm not - I'm accepting that I missed it" [18/27]. Shortly after, Piazza used the word "victim" two more times, trial counsel objected, and also inexplicably, the judge overruled the objection [18/29]. Due to the objections of trial counsel, this issue has been

preserved for appellate review. *Commonwealth v. Perryman*, 55 Mass. App. Ct. 187, 192 (2002). Appellate courts review decisions of the trial judge on the admissibility of evidence for abuse of discretion. *Commonwealth v. Waters*, 399 Mass. 708, 715 (1987).

First, concerning the testimony about the "Child Exploitation Task Force", the prosecutor admitted that use of the phrase would be "confusing and prejudicial" [17/5]. The judge agreed and allowed trial counsel's motion in limine [17/5]. Then the judge overruled trial counsel's objection, for some unknown reason, when the phrase was used [18/106]. Use of the phrase prejudiced Lowery and was totally irrelevant. T.D. was not a child - she testified she was 18 years old at the time of the incident [18/66]. There was also no evidence she was exploited. She testified that her and Lowery were friends at the time of the incident, he was not her pimp, and he did not know why she was going to the hotel [18/65-87].

Section 403 of the Massachusetts Guide to Evidence states "[t]he court may exclude relevant evidence if it probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay,

wasting time, or needlessly presenting cumulative evidence" *Mass. G. Evid.* §403 (2018). *See Commonwealth v. Berry*, 420 Mass. 95, 109 (1995)("trial judges must take care to avoid exposing the jury unnecessarily to inflammatory material that might inflame the jurors' emotions and possibly deprive the defendant of an impartial jury").

In addition, the use of the term "victim" numerous times further added to the prejudice here. As noted above, T.D. testified she was not a victim. Numerous cases have stated that words of this type should be avoided in criminal trials, whether they are testified to by a witness (*Commonwealth v. Coleman*, 30 Mass. App. Ct. 229, 237 (1991); *Commowealth v. McNickles*, 22 Mass. App. Ct. 114, 125 n.10 (1986)), contained in documents admitted in evidence (*Commonwealth v. Foley*, 12 Mass. App. Ct. 983 (1981)) or used in a judge's instructions to a jury *(Commonwealth v. Krepon*, 32 Mass. App. Ct. 945, 947 (1992)).

The judge abused her discretion by allowing these words and phrases to be admitted into evidence. The judge's ruling resulted from "'a clear error of judgement in weighing' the factors relevant to the decision...such that the decision falls outside the

range of reasonable alternatives'" *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014)(citations omitted).

The judge's rulings above denied Lowery his right to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article Twelve of the Declaration of Rights of the Massachusetts Constitution. *Chambers v. Mississippi*, 410 U.S. 284, 294-303 (1973); *Estes v. Texas*, 381 U.S. 532, 538-545 (1965).

VI. THE PROSECUTOR'S CLOSING ARGUMENT WAS IMPROPER AS SHE MADE A STATEMENT THAT WAS NOT A FAIR INFERENCE FROM THE EVIDENCE AND WAS INTENDED TO APPEAL TO THE JURY'S SYMPATHY AND EMOTIONS.

During her closing argument, the prosecutor said "[h]e knew she was vulnerable, and he took advantage of her. He preyed on her, and he put her to work" [19/106]. After the prosecutor's closing, trial counsel told he judge he had a number of objections [19/106-107]. One of them was that the prosecutor said "that he preyed on her and put her to work" [19/107]. He added that "there was no evidence of that, that he was the one who got her into this business or anything of that nature" [19/107]. He also stated that it is "very prejudicial and that's (sic) there's no evidence of that [19/107].

The judge responded to the objection by stating "[i]t's inferable reasonably from the text messages that he put her to work for him. It may not have been the first time, I don't know, so I'm not striking that either" [19/107]. Trial counsel's objection to those statements preserved this issue for appellate review. *Commonwealth v. Bolling*, 462 Mass. 440, 455 (2012). This Court must determine whether the improper statements constituted prejudicial error. *Commonwealth v. Santiago*, 425 Mass. 491, 500 (1997), *S.C.* 427 Mass. 298 (1998).

Lowery is arguing the use of the phrase "he preyed on her and put her to work" is improper argument. Lowery also argues that the sentence previous to that "she was vulnerable and he took advantage of her" is part of the same improper comments. The judge never addressed the use of the word "preyed", only stating that the text messages inferred that she was working for him. The use of that word implies that T.D. was a helpless victim, and unable to resist what Lowery was doing.

As trial counsel argued, there was no evidence of that. She testified she placed the advertisement on Backpage.com, and it contained her phone number

[18/80,83]. There was nothing in her testimony or in the text messages admitted into evidence that he forced her to do anything or that he was the one who initiated her into the prostitution business. It is very likely that she was prostitute prior to June 2015.

Again, her testimony was that she was close friends with Lowery in 2015 and he was not her pimp [18/66,87,90]. She testified that she bought her own cell phones and paid the cell phone bill [18/72]. She stated Lowery did not regularly give her rides to places and there were other people that also gave her rides [18/84]. There was no evidence that he ever bought her anything or supported her in any way.

"Prosecutorial 'appeals to sympathy...obscure the clarity with which the jury would look at the evidence and encourage the jury to find guilt even if the evidence does not reach the level of proof beyond a reasonable doubt'" *Commonwealth v. Bois*, 476 Mass. 15, 34 (2016), *citing Santiago*, supra at 501. There are a number of cases in the Commonwealth where an appellate court has found a prosecutor's argument to be improper for appealing to the jury's sympathy. *Commonwealth v. Rutherford*, 476 Mass. 639, 645 (2017); *Commonwealth v. Bizanowicz*, 459 Mass. 400, 420 (2011).

As stated in *Commonwealth v. Kozec*, 399 Mass. 514, 516-18 (1987)

> ...a prosecutor should not refer to the defendant's failure to testify, misstate the evidence or refer to facts not in evidence, interject personal belief in the defendant's guilt, play on racial, ethnic, or religious prejudice or on the jury's sympathy or emotions, or comment on the consequences of a verdict... The consequences of prosecutorial error depend an a number of factors, such as: Did the defendant seasonably object to the argument? Was the prosecutor's error limited to 'collateral issues' or did it go to the heart of the case (*Commonwealth v. Shelley*, 374 Mass. 466, 470-471 [1978])? What did the judge tell the jury, generally or specifically, that may have mitigated the prosecutor's mistake, and generally did the error in the circumstances possibly make a difference in the jury's conclusions? *See Commonwealth v. Cifizzari*, 397 Mass. 560, 579-80 (1986); *Commonwealth v. Bourgeois*, 391 Mass. 869, 884-85 (1984).

Kozec, supra at 516-18 (footnotes omitted).

Addressing these factors in order, there was an objection by trial counsel after the prosecutor finished her closing argument [19/106-107]. The judge did not believe that any of the prosecutor's remarks were improper and did not instruct the jury to disregard them [19/107].

The comments did go to the heart of the case. The issue in the case was whether T.D. was working for Lowery and whether Lowery controlled her actions as her pimp. The prosecutor's characterization that Lowery

was "preying" and "took advantage of her" certainly intended to portray him as a evil person who had groomed her from a young age to make money for him. The problem is that T.D. never testified that Lowery had done that.

The judge gave the usual instructions to the jury concerning arguments of counsel. Prior to the trial starting she told them that opening statements of counsel are not evidence [18/13], and then in her final instructions she stated that the opening statements and closing arguments are not evidence [19/114-115].

The comments by the prosecutor could have made a difference in the jury verdict. If the jury was influenced by the prosecutor's statements, they would have difficulty considering the evidence rationally as they would have been sympathetic to T.D..

The prosecutor's comments noted above in his argument were improper and created prejudicial error. They also denied Lowery his right to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article Twelve of the Declaration of Rights of the Massachusetts Constitution. *See Wainwright v. Greenfield*, 474 U.S. 284, 289-295 (1986)(prosecutor's

closing violated due process); *Chapman v. California* 386 U.S. 18, 24-26 (1967)(prosecutor's comments not harmless error and denied defendant fair trial).

In addition, even if this Court were to find that the errors argued in Issues I through VI above, taken individually, were not sufficient to warrant reversal, Lowery would argue that there were a combination of errors in this trial that were unduly prejudicial. They warrant the granting of a new trial. *Commonwealth v. Cancel*, 394 Mass. 567, 576 (1985), *Commonwealth v. Crayton*, 470 Mass. 228, 253-54 (2014).

CONCLUSION

For the reasons argued above, Lowery's convictions should be reversed and remanded to the Middlesex County Superior Court for a new trial.

Respectfully submitted,

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ADDENDUM

Table of Contents

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the U.S. Constitution provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article Twelve of the Declaration of Rights of the Massachusetts Constitution provides:

> No subject shall be held to answer for any crimes of offence, until the same is fully and plainly, substantially and formally, described to him; or

be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face; and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgement of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGSIN CRIMINAL CASES

Title I CRIMES AND PUNISHMENTS

Chapter 265 CRIMES AGAINST THE PERSON

Section 50 TRAFFICKING OF PERSONS FOR SEXUAL SERVITUDE; TRAFFICKING OF PERSONS UNDER 18 YEARS FOR SEXUAL SERVITUDE; TRAFFICKING BY BUSINESS ENTITIES; PENALTIES; TORT ACTIONS BROUGHT BY VICTIMS

Section 50. (a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison

for not less than 5 years but not more than 20 years and by a fine of not more than $25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than $1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XV REGULATION OF TRADE

Chapter 94C CONTROLLED SUBSTANCES ACT

Section 34 UNLAWFUL POSSESSION OF PARTICULAR CONTROLLED SUBSTANCES, INCLUDING HEROIN AND MARIJUANA; LAWFUL POSSESSING, STORING, ANALYZING, PROCESSING AND TESTING OF MEDICAL MARIJUANA AND MEDICAL MARIJUANA-INFUSED PRODUCTS BY LABORATORIES EXCEPTION

Section 34. No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. Except as provided in Section 32L of this Chapter or as hereinafter provided, any person who violates this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment. Any person who violates this section by possessing heroin shall for the first offense be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than

two thousand dollars, or both, and for a second or subsequent offense shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years or by a fine of not more than five thousand dollars and imprisonment in a jail or house of correction for not more than two and one-half years. Any person who violates this section by possession of more than one ounce of marihuana or a controlled substance in Class E of section thirty-one shall be punished by imprisonment in a house of correction for not more than six months or a fine of five hundred dollars, or both. Except for an offense involving a controlled substance in Class E of section thirty-one, whoever violates the provisions of this section after one or more convictions of a violation of this section or of a felony under any other provisions of this chapter, or of a corresponding provision of earlier law relating to the sale or manufacture of a narcotic drug as defined in said earlier law, shall be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both.

If any person who is charged with a violation of this section has not previously been convicted of a violation of any provision of this chapter or other provision of prior law relative to narcotic drugs or harmful drugs as defined in said prior law, or of a felony under the laws of any state or of the United States relating to such drugs, has had his case continued without a finding to a certain date, or has been convicted and placed on probation, and if, during the period of said continuance or of said probation, such person does not violate

any of the conditions of said continuance or said probation, then upon the expiration of such period the court may dismiss the proceedings against him, and may order sealed all official records relating to his arrest, indictment, conviction, probation, continuance or discharge pursuant to this section; provided, however, that departmental records which are not public records, maintained by police and other law enforcement agencies, shall not be sealed; and provided further, that such a record shall be maintained in a separate file by the department of probation solely for the purpose of use by the courts in determining whether or not in subsequent proceedings such person qualifies under this section. The record maintained by the department of probation shall contain only identifying information concerning the person and a statement that he has had his record sealed pursuant to the provisions of this section. Any conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of any disqualification or for any other purpose. No person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose.

Notwithstanding any other penalty provision of this section, any person who is convicted for the first time under this section for the possession of marihuana or a controlled substance in Class E and who has not previously been convicted of any offense pursuant to

the provisions of this chapter, or any provision of prior law relating to narcotic drugs or harmful drugs as defined in said prior law shall be placed on probation unless such person does not consent thereto, or unless the court files a written memorandum stating the reasons for not so doing. Upon successful completion of said probation, the case shall be dismissed and records shall be sealed.

It shall be a prima facie defense to a charge of possession of marihuana under this section that the defendant is a patient certified to participate in a therapeutic research program described in chapter ninety-four D, and possessed the marihuana for personal use pursuant to such program.

Notwithstanding any general or special law to the contrary, a laboratory may possess, store, analyze, process and test medical marijuana and medical marijuana-infused products; provided, however, that such laboratory shall do so in accordance with the department's regulations and written guidelines governing procedures for quality control and testing of products for potential contaminants.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
CRIMINAL ACTION
No. 1681CR00128

COMMONWEALTH

vs.

ROWEN LOWERY

DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The defendant Rowen Lowery ("defendant" or "Lowery") is charged with possession with intent to distribute marijuana, second and subsequent offense. Rowan seeks to suppress the evidence seized pursuant to the execution of search warrants issued for six cellular phones on the grounds that the affidavit submitted in support of these warrants does not contain any particularized evidence that there was likely to be evidence of a crime on the cell phones.[1] The Commonwealth asserts, to the contrary, that the affidavit does demonstrate a nexus between the cell phones and alleged criminal activity.

FACTS

On August 7, 2015, Woburn police officer Brian McManus applied for and was granted search warrants for six cellular telephones found in the defendant's car on July 31, 2015. Officer McManus' affidavit submitted in support of the search warrants contained a description of his training and experience, which included working on both narcotics and human trafficking cases. He described his knowledge, based on his training and experience, of the structure of sex trafficking organizations and the use of cellular phones to facilitate sex trafficking activity. He

[1] The same affidavit was submitted in support of each of the search warrants.

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further described how drug traffickers use cellular phones to conduct their business. The affidavit also included the following specific information:

On July 31, 2015, members of the Woburn Vice/Narcotics Unit, Southern Middlesex Regional Drug Task Force, and the Federal Bureau of Investigations (Child Exploitation Task Force) were conducting an investigation into the trafficking of persons for sexual servitude in the City of Woburn. An undercover officer responded to an advertisement on the boston.backpage.com website ("Backpage") by calling a phone number listed in the ad and speaking to a woman who identified herself as "Passion." The Backpage website and the specific advertisement at issue contained photographs. The woman agreed to meet the undercover officer at a hotel room.

Thereafter, detectives conducting surveillance around the hotel, observed the defendant drop-off a woman at the hotel. The woman, who was later identified as the same person who identified herself to the undercover officer as Passion on the telephone, went to the prearranged hotel room. There, she met up with the undercover officer and offered to perform oral sex for money. After he gave her the money requested, she started texting someone on her phone. After seemingly receiving a response to her text, she indicated she would start the session. The undercover officer gave a signal and assisting officers entered the hotel room. The woman was identified as Techie Dimanche. The officers seized Ms. Dimanche's phone: Ms. Dimanche told the officers that she pays the defendant to drive her to commercial sexual activity appointments and that the phone she had in her possession was used to respond to clients. She said that her personal phone and identification were in the defendant's car. She further indicated that she had used GPS to find the location of the hotel and to estimate her arrival time.

Meanwhile, other officers stopped the defendant in his car and arrested him. Pursuant to an inventory search, Officers found five additional cell phones, a business card which contained the title "Independent Entertainment Services." The business card listed "RO" as the manager, and included a cell phone number which was later determined to be listed to the defendant. The card further stated "hiring new talent escort/strippers" and contained the motto "Making Money Should be Fun & Easy." Officers also found bags of marijuana packaged for distribution, and multiple female identification cards, Massachusetts driver's licenses and identification cards in the defendant vehicle. There were no GPS units in the car, suggesting that a cell phone must have been used by Ms. Dimanche as a GPS to locate the hotel and estimate her time of arrival. Finally, officers seized from the car condoms, personal lubricants, female under garments, $429 in US currency, prepaid credit cards and multiple hotel keys. The phones that were powered on, received multiple calls during a short period.

ANALYSIS

"In determining whether an affidavit justifies a finding of probable cause, the affidavit is considered as a whole and in a commonsense and realistic fashion . . . ." *Commonwealth v. Cavitt*, 460 Mass. 617, 626 (2011). The affidavit should not be "parsed, severed, and subjected to hypercritical analysis." (quotation and citation omitted). *Commonwealth v. Donahue*, 430 Mass. 710, 712 (2000). "All reasonable inferences which may be drawn from the information in the affidavit may also be considered as to whether probable cause has been established." *Id.* "[A]n affidavit . . . must provide a substantial basis for concluding that [the] evidence connected to the crime will be found" in the specified location. *Commonwealth v. Escalera*, 462 Mass. 636, 642 (2012) (internal quotation omitted). In other words, the government must "demonstrate[] . . .

a nexus between the crime alleged and the place to be searched." *Commonwealth v. Matias*, 440 Mass. 787, 794 (2004) (internal quotation omitted).

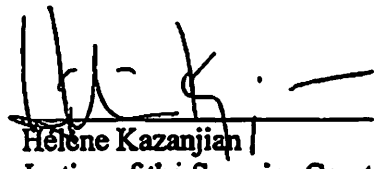
Rowan relies on the Supreme Judicial Court's ("SJC") decision in *Commonwealth v. White*, 475 Mass. 583 (2016), for his assertion that evidence obtained from the cell phones should be suppressed. The SJC held in *White* that while "[t]he experience and expertise of a police officer may be considered as a factor in the [nexus] determination" [when the] search or seizure is a computer-like device, such as a cellular phone, the opinions of the investigating officers do not, alone, furnish the requisite nexus between the criminal activity and the [device] to be searched or seized." *Id.* at 589 (internal quotations omitted). Police are required to "obtain information that establishes the existence of some 'particularized evidence' related to the crime" and "[o]nly then, if police believe, based on training or experience, that this 'particularized evidence' is likely to be found on the device in question, do they have probable cause to seize or search the device in pursuit of that evidence." *Id.*

Here, the affidavit provides the requisite "particularized evidence" necessary to support a finding of probable cause to search the cell phones for evidence of the crime of Trafficking of Persons for Sexual Servitude (G.L. c. 265, § 50). The affidavit does include several paragraphs of boilerplate recitation of Detective McManus's training and experience and his understanding that individuals that engage in sex trafficking use their cell phones to conduct business. However, the affidavit also provides specific information linking the defendant to sex trafficking, and describes the use of cellular phones in the particular undercover incident that led to the defendant's arrest. Furthermore, the Backpage ad and the business cards contained cellular phone numbers and uploaded photographs.

On the other hand, the affidavit does not contain the requisite "particularized evidence" necessary to support a finding of probable cause to search the cell phones for evidence of the crime of possession to distribute a controlled substance (Class D), to wit marijuana (G.L. c. 94C, § 32C). Accordingly, to the extent that the warrants authorized the search of the phones for evidence of drug trafficking, they are not supported by probable cause, and are overbroad. *See White*, 475 Mass. at 589. Based on the record, the court cannot determine if the lack of probable cause to search the phones for evidence of the crime of possession with intent to distribute a controlled substance effects the scope of the search or the lawfulness of the seizure of any items found on the phones. Therefore, the court cannot rule on whether there are items that should be suppressed.

ORDER

It is **ORDERED** that defendant Rowan's motion to suppress evidence is **DENIED**, without prejudice to the defendant filing a further motion regarding the scope of the search of the phones in light of this ruling.



Hélène Kazanjian
Justice of the Superior Court

DATE: March 29, 2018

91 Mass.App.Ct. 1106 (2017)
79 N.E.3d 1111
Commonwealth
v.
Donald McMullin
15-P-1038
Appeals Court of Massachusetts
February 17, 2017

Editorial Note:

This decision has been referenced in an "Appeals Court of Massachusetts Summary Dispositions" table in the North Eastern Reporter. And pursuant to its rule 1:28, As Amended by 73 Mass.App.Ct. 1001 (2009) are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace v. Curran*, 71 Mass.App.Ct. 258, 260 N.4, 881 N.E.2d 792 (2008).

Judgment reversed. Verdict set aside.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this criminal case alleging a single violation of a G. L. c. 209A abuse prevention order (209A order) in 2010, the jury heard evidence of an alleged violation of that order in 2008 for which the defendant had already been tried and acquitted: so-called " acquittal evidence," which the Supreme Judicial Court has subsequently ruled is inadmissible. See *Commonwealth v. Dorazio*, 472 Mass. 535, 547-548, 37 N.E.3d 566 (2015). The jury also heard evidence of more than fifteen other prior bad acts. We conclude that the prejudice resulting from the acquittal evidence, together with the undue prejudice caused by the admission of extensive additional prior bad acts evidence without contemporaneous limiting instructions, created a substantial risk of a miscarriage of justice warranting a new trial.

Background.

1. *The Commonwealth's case.*

The defendant was charged with a violation of a 209A order occurring on September 7, 2010. The victim (the defendant's ex-wife) began by testifying that in 2005, while they were still married, she obtained a 209A order prohibiting him from abusing or contacting her and requiring him to stay away from her home, her workplace, and her mother's home (all located in Needham), and fifty yards from her person. The order was extended annually thereafter and was made permanent in 2009. In June, 2010, the order was modified to require the defendant to stay away from the victim's new home on Central Avenue in Needham and 100 yards from her person. The order was in effect on September 7, 2010.

The victim next testified to a series of prior bad acts. She stated that on approximately December 1, 2007, while driving away from her boy friend's house at 1 a.m., she saw the defendant walking alongside the street, stopped her car, and commenced what turned into an extended conversation. She testified that during the conversation, the defendant said, " [A] restraining order is just a piece of paper, and if . . . someone wants to get you they will." [1]

The victim then testified about a series of alleged encounters occurring after the December 1 incident, in late 2007 and early 2008. On ten or twelve occasions, the defendant had driven by either her boy friend's house or her mother's house, where she lived at the time and which was located on a cul-de-sac or circular street (hereinafter, " cul-de-sac"), off of any main routes. The victim testified that this typically occurred at approximately 3:30 p.m. as she arrived home from work, that the defendant typically drove by " very fast," that she usually did not call the police because she did not see the point, and that she could not remember the

specific dates of any of these occurrences.[2]

She then testified to the acquittal evidence, concerning an incident that occurred on the evening of November 26, 2008. The victim testified that as she arrived at her mother's house, the defendant drove by the house very slowly and then proceeded to " zoom off." She got in her car, drove after him, and called the police in an effort to have him caught. Eventually he was stopped near the center of Needham.[3]

Additionally, the victim testified to a series of " maybe four" encounters, prior to the charged incident, in which she had seen the defendant on a side street near her home (Cynthia Road), " [s]itting over there and then he'll take off real quickly," so she had not called the police on those occasions. To her knowledge, the defendant did not know anyone living on Cynthia Road, nor were any businesses located there.

All of the above testimony regarding the previous encounters -- two on specific dates, and two series of incidents totaling fourteen to sixteen encounters -- was admitted without any pertinent objection by the defendant,[4] and without any limiting instruction from the judge. Most of the evidence had been the subject of motions in limine, which we discuss *infra*.

Finally, the victim testified to the events underlying the charge the defendant faced at trial. She stated that on September 7, 2010, shortly after 3:30 p.m., she returned from work and went to a store next door to her home on Central Avenue, where her boy friend worked. Not finding him there, she began to walk toward her boy friend's home, which was also located on Central Avenue next to the store and directly opposite where Cynthia Road intersected Central Avenue. As she walked, she looked across Central Avenue and saw a red Mustang automobile parked down Cynthia Road, thirty to fifty feet from the intersection. She recognized the Mustang as one she had previously seen the defendant driving.

The victim testified that on this occasion, as she kept walking, the Mustang pulled forward on Cynthia Road, almost but not all the way to the intersection with Central Avenue, and stopped. There was no traffic on that part of Central Avenue at the time. The driver's window was down and she saw the defendant in the car, staring at her. He seemed to stare for a long time, perhaps twenty to thirty seconds. " It was enough time for me to freeze." She described him as looking at her with " intense-looking, stare-me-down, daggery eyes" that made her afraid and unsure of what he was going to do. As the defendant stared from his car about thirty-five feet away, she ran back toward her house. The defendant then turned his car onto Central Avenue and drove off in the opposite direction, while she called the police.

The Commonwealth's only other witness was a Needham police sergeant, who testified that on September 7, 2010, in response to a call, he went to the scene of the incident and spoke to the victim. She was " upset and shaking . . . very sad, her voice was trembling." He did not see the defendant at the scene or go to his house to speak to him. The officer also testified that the traffic on Central Avenue at that time on a weekday was typically light and that he had no contrary memory of the traffic on the day in question. The only conduct for which the defendant was criminally charged in this case took place that day.

2. *The defendant's case.*

The defense theory was that the contact on September 7, 2010, was accidental or incidental and that the defendant took reasonable steps to end it. The defendant testified that he was living at his mother's Ardmore Road home and left the home that afternoon to drive to a store in the center of Needham. Ordinarily he would have driven south down Central Avenue to get there, but now that the victim lived on Central Avenue, in order to " avoid her house, avoid seeing her," he took a detour onto Cynthia Road, which turned off of Central Avenue north of the victim's home and rejoined it further south. He had previously " Googled" her address and Cynthia Road to make sure his route would keep him at least 100 yards away from her home, and he had found that the

distance was 528 feet.

As he returned from the store along the reverse route, he stopped at the end of Cynthia Road, trying to get onto Central Avenue, which he testified was " a very busy street" with " almost stop and go" traffic at that time. As he awaited an opportunity to turn, he saw the victim across Central Avenue, walking or running straight toward him. When she stepped out onto Central Avenue, the traffic stopped, which allowed him to turn right onto Central Avenue; he did so " as quick as [he] could" and went home.

The defendant further testified that he did not try to get the victim's attention and that he was shocked to see her coming straight toward him. The red Mustang that he was driving was one that he had restored himself and only recently registered, so that this was the second day he had ever driven that car, the first time having been at night.

3. *Motion in limine.*

Prior to trial the Commonwealth filed a motion in limine seeking a ruling that certain prior bad acts evidence would be admissible at trial. The defendant filed his own motion in limine seeking to exclude such evidence. The motion judge, who also presided at trial, allowed the Commonwealth's motion (and denied the defendant's motion) as to the incident occurring on December 1, 2007, and the series of incidents in 2007 and 2008, described in the Commonwealth's motion in limine as follows:

"Several other instances occurred in 2007 and 2008, in which the victim observed the Defendant as she was either entering or exiting from her boyfriend's home on Central Avenue in Needham. The victim observed the Defendant either drive slowly along the street glaring at her, or would park across the street from the home." [5]

Defense counsel objected at the hearing on the motion in limine that this was " not specific enough." She argued:

"I can't look into these incidences and determine whether there's alibi issues, whether he was actually in town at those times. Without being given any specific information about several instances, not even a certain number of them, that occurred over two years, there's really not a lot I can do on cross-examination with that witness. She can say it happened whenever, and there's not a lot I can do to rebut that without having some specifics of . . . when they happened."

The judge also allowed the Commonwealth's motion as to the incident occurring on November 26, 2008, despite defense counsel's objection that the defendant had previously been criminally charged in connection with that incident and found not guilty.[6] The judge did not have the benefit of the subsequent ruling in *Dorazio*, 472 Mass. at 547, that evidence of prior bad acts for which a defendant was tried and acquitted is inadmissible.

Discussion.

1. *Admission of " acquittal evidence."*

The use against the defendant of the incident of November 26, 2008, for which he had previously been found not guilty, was (although the judge could not have known it at the time), error in light of *Dorazio*. There, the Supreme Judicial Court held that " the collateral estoppel protections necessarily embraced by art. 12 [of the Declaration of Rights] warrant the exclusion of . . . acquittal evidence," i.e., evidence of prior bad acts for which a defendant was tried and acquitted.[7] 472 Mass. at 547.

Here, the defendant is entitled to the benefit of *Dorazio*, but because, as in *Dorazio*, the defendant here did not preserve the issue, we examine whether admission of the evidence created a substantial risk of a miscarriage of justice.[8] *Id.* at 548. Because a combination of errors may create such a risk even where *no* single error is sufficiently prejudicial to require reversal, see *Commonwealth v. Cancel*, 394 Mass. 567, 576, 476 N.E.2d 610 (1985), we review the defendant's other unpreserved claims

of error before analyzing the overall impact of the errors that occurred.

2. *Other prior bad acts evidence.*

The defendant argues that the judge abused his discretion in admitting the other prior bad acts evidence because " its probative value [was] outweighed by the risk of unfair prejudice to the defendant," *Commonwealth v. Crayton*, 470 Mass. 228, 249, 21 N.E.3d 157 (2014), and that the judge failed to give adequate limiting instructions. Evidence of prior bad acts may not be introduced to prove the defendant's " bad character or propensity to commit the crime charged, but such evidence may be admissible if relevant for some other purpose . . . such as to show a common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive." *Commonwealth v. Helfant*, 398 Mass. 214, 224, 496 N.E.2d 433 (1986) (citations omitted). Even if relevant for one of these permissible purposes, such evidence will not be admitted if its probative value is outweighed by the risk of unfair prejudice to the defendant. See *Crayton*, 470 Mass. at 249. " It is implicit in the general rule regarding the inadmissibility of prior bad acts evidence that the admission of such evidence carries with it a high risk of prejudice to the defendant." *Commonwealth v. Anestal*, 463 Mass. 655, 672, 978 N.E.2d 37 (2012), quoting from *Commonwealth v. Barrett*, 418 Mass. 788, 795, 641 N.E.2d 1302 (1994). The potential prejudice is of several types:

"Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defen[s]e, raises a variety of issues, and thus diverts the attention of the jury from the [crime] immediately before it; and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him." *Anestal*, 463 Mass. at 665, quoting from *Commonwealth v. Jackson*, 132 Mass. 16, 20-21 (1882).

Thus, " even if relevant, a judge must guard against the risk that evidence of prior bad acts will divert the jury's attention from the charged acts." *Commonwealth v. Dwyer*, 448 Mass. 122, 129, 859 N.E.2d 400 (2006). Bad acts testimony may create a " need to instruct the jury with particular care what to do in order to avoid diversionary misuse of the material." *Commonwealth v. Mills*, 47 Mass.App.Ct. 500, 506, 713 N.E.2d 1028 (1999). Indeed, especially where " [t]he question whether the evidence was more prejudicial than probative is close," the provision of adequate contemporaneous and final limiting instructions may tip the balance in favor of admissibility. See *Commonwealth v. Gomes*, 475 Mass. 775, 785, 61 N.E.3d 441 (2016).

The determination whether to admit such evidence is " committed to the sound discretion of the trial judge and will not be disturbed by a reviewing court absent 'palpable error.'" *Commonwealth v. McCowen*, 458 Mass. 461, 478, 939 N.E.2d 735 (2010), quoting from *Commonwealth v. Fordham*, 417 Mass. 10, 23, 627 N.E.2d 901 (1994). The question is not whether we would have made a different decision; " [i]nstead, we will uphold the judge's decision unless 'we conclude the judge made a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives.'" *Commonwealth v. Robertson*, 88 Mass.App.Ct. 52, 54, 35 N.E.3d 771 (2015) (prior bad acts case), quoting from *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014).

Here, although the defendant had filed a motion in limine to exclude the prior bad acts evidence as unduly prejudicial, he did not renew that objection at trial, nor did he object to the testimony about the 2007-2008 series of incidents that went beyond what had been allowed by the ruling in the motion in limine, and thus he has not preserved those issues.[9] Nor did defense counsel request limiting instructions when the evidence was introduced; counsel did request, and pronounced herself satisfied with, an instruction on propensity evidence in the judge's final charge. Therefore, we review for whether any error or abuse of discretion in admitting and

instructing on the evidence created a substantial risk of a miscarriage of justice. See *Commonwealth v. Randolph*, 438 Mass. 290, 294-295, 780 N.E.2d 58 (2002).

a. *Probative value.*

The probative value of the prior bad acts evidence (other than the acquittal evidence) was such that, had it been limited to the evidence in the motion in limine allowed by the judge at the pretrial hearing (but see part 2.b., *infra*), and had it been admitted with timely limiting instructions to prevent unfair prejudice, we would reject the defendant's claim of an abuse of discretion. If the victim's version of those earlier events were believed,[10] the evidence was relevant for proper purposes in showing the defendant's guilt of the alleged September, 2010, violation. All of the prior incidents involved the defendant going out of his way to be in close proximity to where the victim was likely to be, thus tending to show an absence of accident or mistake and an intent to violate the 209A order in the September, 2010, encounter.[11] The 2007-2008 series of events tended to show that he meant to make his proximity known to her, and further showed his intent to violate the order. The December 1, 2007, incident, in which the defendant told the victim that " a restraining order is just a piece of paper, and if . . . someone wants to get you they will," tended to show his intent to disregard the 209A order. That comment was also relevant to the victim's state of mind, in that it could easily be understood as a veiled threat, making it more likely that when, during the September, 2010, encounter (unlike on previous occasions), the defendant stopped and stared intently at the victim, he placed her in fear of imminent serious physical harm, so as to constitute " abuse" as defined in G. L. c. 209A, § 1, as appearing in St. 1990, c. 403, § 2.[12]

b. *Risk of unfair prejudice.*

The victim's trial testimony, however, was substantially different from, and more voluminous and damaging than, the evidence described in the motion in limine, and we necessarily analyze unfair prejudice in light of what occurred at trial.[13] The principal change was in the victim's description of the series of drive-bys in 2007 and 2008. First, the number of instances increased, from " several" to " ten [or] 12 times." Second, the site of the violations changed. The motion in limine said they had occurred only at her boy friend's house, which was on a main road within half a mile of where the defendant lived, was not listed on the 209A order, and the exact location of which the defendant denied knowing. But at trial, the location of the alleged prior bad acts expanded to encompass, as well, her mother's house, which was on a cul-de-sac off of any main routes, admittedly known to the defendant, and which the 209A order expressly placed off limits to him. The potential effect of this change on the defense theory of accidental or incidental contact is plain. Third, the description of the defendant's conduct changed, from either driving slowly along the street glaring at her or parking across the street, to " go[ing] by very fast and tak[ing] off fast," thus explaining, the victim testified, why she had not called the police. And fourth, the times of the incidents changed, from occurring when the victim was " either entering or exiting from her boyfriend's home," to all occurring at approximately 3:30 p.m. -- the time at which, she testified, the defendant knew since the time of their marriage, she usually returned from work.

We do not question or express a view about the victim's veracity. The discrepancies between the description in the motion in limine and her ultimate testimony could have arisen from any number of sources. But the nature and extent of the discrepancies made the trial testimony more damaging, more difficult to counter, or both, compared to what had been described in the motion. See *Jackson*, 132 Mass. at 20 (prior bad acts evidence objectionable in part because it " compels the defendant to meet charges of which the [charging document] gives him no information"); *Anestal*, 463 Mass. at 665.

The victim's trial testimony also described the other series of " maybe four" incidents, *not* mentioned in the motion in limine, in which she had observed him on Cynthia Road, " [s]itting over there and then he'[d] take off real quickly,"

so that she had not called the police on those occasions either. Although she testified that these incidents had occurred " [a] handful, maybe four, four times or so," the prosecutor, in questioning her further, referred to them as occurring " at least four or five times before." The defendant had no notice that he would be faced with these ever-proliferating allegations.[14] Prior bad acts evidence is " inherently prejudicial," *Crayton*, 470 Mass. at 249 n.27, quoting from *Commonwealth v. Johnson*, 35 Mass.App.Ct. 211, 218, 617 N.E.2d 1040 (1993), *S.C.*, 43 Mass.App.Ct. 509, 684 N.E.2d 627 (1997), and " [i]t has long been recognized that bad acts, even when nominally offered to show . . . some . . . legitimate object, become dangerously confusing to the triers when piled on and unduly exaggerated." *Mills*, 47 Mass.App.Ct. at 505. This case illustrates that danger.

Further risk of " dangerous[] confusi[on]" ensued, *ibid.*, when the victim was unable to testify to the specific dates of any of the ten to twelve December, 2007, and early 2008 occurrences following the December 1, 2007, incident. When cross-examined about her testimony that she had not called the police about those incidents, the victim testified that she had in fact called the police about one of them, leading to a mutually-puzzling exchange with defense counsel about which incidents they were discussing, and causing the judge to instruct defense counsel, " It has to be specific. It's confusing. What incident are you talking about?" The victim then indicated that she was actually referring to a separate incident (apparently the November 26, 2008, incident for which the defendant was tried and acquitted), but, judging from the transcript, the question of what incident(s) she was referring to likely remained unclear to the jury.[15]

Moreover, the sheer amount of prior bad acts evidence introduced by the prosecution, and necessarily responded to by the defense, was very substantial in comparison to the evidence directly concerning the charged incident. As the judge recognized after ruling on the motions in limine, " I've allowed in the three prior bad acts, which are extensive. I mean it's going to take a lot of testimony." And this did not take into account the second series of " maybe four" incidents in which the victim had observed the defendant sitting on Cynthia Road and then " tak[ing] off real quickly."

The prior bad acts testimony and related closing arguments consumed nearly as much time as did the testimony and arguments about the September, 2010, encounter. This risked overwhelming the evidence regarding the charged act and distracting the jurors from the question whether the defendant committed it.[16] Although it was incumbent upon the defendant to object when the Commonwealth went beyond what was allowed in the motion in limine, our cases also suggest that even without an objection, there are occasions when " [t]he judge should . . . intervene[] to prevent" these dangers. *Dwyer*, 448 Mass. at 129. See *ibid.*, quoting from *Commonwealth v. Roche*, 44 Mass.App.Ct. 372, 380, 691 N.E.2d 946 (1998) (recognizing dangers of distracting jury and " overwhelming a case with . . . bad act evidence"). " At times during the course of any trial . . . it may become necessary for a judge to intervene although there has been no objection to the admissibility of certain evidence." *Commonwealth v. Sapoznik*, 28 Mass.App.Ct. 236, 241 n.4, 549 N.E.2d 116 (1990) (to prevent improper use of prior bad acts testimony, " the judge should have interjected himself into the trial, even in the absence of an objection from the defendant").

The prosecution's closing argument made prior bad acts a centerpiece of the case, telling the jury no fewer than six times that they were looking at " the same defendant" who had approached the victim on multiple prior occasions. The prosecutor recounted the incidents of December 1, 2007, late 2007 to early 2008, and November 26, 2008, as well as the undated incidents on Cynthia Road. And he again took liberties with the number of incidents, twice telling the jury that in 2007-2008 the defendant had driven by the boy friend's or mother's home on " 10, 12, 14 separate occasions" (when the victim had testified to " ten [or] 12 times"), and

that the defendant had previously parked on Cynthia Road " at least on four to five separate occasions" (when the victim had testified to " [a] handful, maybe four" occasions). The incidents that the victim had testified occurred " later in 2007 and earlier in 2008" occurred, according to the prosecutor's closing, " throughout 2007 and into 2008." The closing thus " piled on and unduly exaggerated," increasing the likelihood that the bad acts evidence would be " dangerously confusing to the triers" of fact. *Mills*, 47 Mass.App.Ct. at 505.

c. *Limiting instructions.*

Further heightening the risk of unfair prejudice, the judge gave no contemporaneous limiting instructions informing the jury of the purposes for which the prior bad acts evidence could, and could not, be considered. Compare *Gomes*, 475 Mass. at 785 (considering contemporaneous limiting instructions, repeated in final charge, in determining that probative value of bad acts evidence outweighed its prejudicial effect).

We recognize that the defendant failed to request such instructions, and " the law does not require a judge to give limiting jury instructions . . . unless so requested by the defendant." *Commonwealth v. Leonardi*, 413 Mass. 757, 764, 604 N.E.2d 23 (1992) (prior bad acts instruction). See *Commonwealth v. Roberts*, 433 Mass. 45, 48, 740 N.E.2d 176 (2000) (same). " But even if relevant, a judge must guard against the risk that evidence of prior bad acts will divert the jury's attention from the charged acts." *Dwyer*, 448 Mass. at 129. See *Commonwealth v. Gollman*, 51 Mass.App.Ct. 839, 845, 748 N.E.2d 1039 (2001) (stating in dictum that " all cases where prior bad acts are offered invite consideration of . . . the importance . . . of delivering careful limiting instructions"), *S.C.*, 436 Mass. 111, 762 N.E.2d 847 (2002) (affirming conviction).

Especially where, as here, the determination whether undue prejudice outweighs probative value is a close question, there is a " need to instruct the jury with particular care what to do in order to avoid diversionary misuse of the material." *Mills*, 47 Mass.App.Ct. at 506. See *Gomes*, 475 Mass. at 785 (where balance between prejudice and probative value was " close," limiting instructions persuaded court that bad acts evidence was properly admitted). And it is " preferable that the limiting instruction be given the same day as the testimony at issue." *Commonwealth v. Linton*, 456 Mass. 534, 551 n.12, 924 N.E.2d 722 (2010). See Criminal Model Jury Instructions for Use in the District Court 3.760 (2009) (instruction should be given " at the time the evidence is admitted"). Even contemporaneous limiting instructions have sometimes been held insufficient to prevent undue prejudice from prior bad acts testimony. See *Dwyer*, 448 Mass. at 128-129 & n.8. Here, there were no contemporaneous limiting instructions at all.

We recognize that the judge's final charge was delivered the next morning, and that it did include, at the defendant's request, an instruction on how to consider the prior bad acts evidence. But that instruction, in the context of the entire charge, was insufficient to avert the risk of undue prejudice. First, it was immediately preceded by a broadly worded instruction that, while unremarkable if understood as confined to the issue of accidental or incidental contact, nevertheless invited the jury, in deciding whether there was " *any* contact which violated the abuse prevention order," to consider " *all* of the evidence in this case" regarding " *any* contact" between the parties, including " the number of contacts over time" (emphasis added).[17] This unfortunate juxtaposition undercut the force of the limiting instruction on prior bad acts that followed.

That limiting instruction itself[18] risked confusing the jury, by instructing that they could consider the evidence on the issue of " motive for testifying" -- which was not in dispute here -- and " those sorts of things" -- a phrase that left the jury free to speculate about what other uses of the evidence, not mentioned, were nonetheless permissible.[19] Overall, even if such an instruction standing alone might not constitute error, compare *Commonwealth v. Marrero*, 427 Mass. 65, 72-73 & n.5, 691 N.E.2d 918 (1998), it

heightened the risk that unfair prejudice would outweigh probative value.[20]

Accordingly, we are constrained to conclude that admission of the additional prior bad acts evidence beyond that described in the motion in limine and approved by the judge at the pretrial hearing, which resulted in a large body of such evidence being presented to the jury without any contemporaneous limiting instructions and without a more effective final instruction, was, despite the lack of objections, an abuse of discretion. See *Crayton*, 470 Mass. at 252 (" [I]t was an abuse of discretion to admit the 'bad act,' even with a limiting instruction," where instruction was insufficient).[21]

d. *Substantial risk of miscarriage of justice.*

Because the defendant failed to preserve the issue, we examine whether the admission of the prior bad acts evidence without adequate limiting instructions created a substantial risk of a miscarriage of justice. See *Randolph*, 438 Mass. at 294-295. That question turns on whether we have " a serious doubt whether the result of the trial might have been different had the error not been made." *Commonwealth v. LeFave*, 430 Mass. 169, 174, 714 N.E.2d 805 (1999). " In making that determination, we consider the strength of the Commonwealth's case against the defendant (without consideration of any evidence erroneously admitted), the nature of the error, whether the error is sufficiently significant in the context of the trial to make plausible an inference that the [jury's] result might have been otherwise but for the error, and whether it can be inferred from the record that counsel's failure to object was not simply a reasonable tactical decision." *Commonwealth v. Alphas*, 430 Mass. 8, 13, 712 N.E.2d 575 (1999) (quotations omitted).

Here, the case against the defendant was far from overwhelming, depending almost entirely on whose version of events the jury believed. The only independent testimony, that of the Needham police sergeant, lent only some support to the victim's account and was not entirely inconsistent with the defendant's. It is a " plausible inference" that the verdict might have been different had the prior bad acts evidence been completely or partially excluded, or had any such evidence that was admitted been accompanied by more suitable limiting instructions.

We conclude that the admission of the acquittal evidence, regarding events on November 26, 2008, contrary to the rule later announced in *Dorazio*, contributed significantly to a risk of a miscarriage of justice. It was particularly damaging because it expressly invited the jury to reconsider, under a lower, preponderance of the evidence standard, see note 10, *supra*, whether the defendant had previously violated the 209A order.[22] Of all the prior bad acts evidence admitted at trial, this was one of only two incidents as to which the victim provided a specific date and the defendant acknowledged that some incident had actually taken place on that date.[23] Of course, the testimony as to what had occurred on November 26, 2008, strongly differed on important details, and the victim's version -- in which the defendant had gone out of his way to drive onto the cul-de-sac in order to encounter her at her mother's house -- severely undercut the defense theory of accidental or incidental contact on the day of the charged incident. Thus, the conflicting testimony about the November 26, 2008, incident presented a critical test of the defendant's credibility -- a test that, if failed, would likely heavily influence the jury's assessment of whether he was telling the truth about the charged incident. Under *Dorazio*, however, having once been acquitted of the prior incident, he should not have been put to that test at all.

As for the other prior bad acts evidence, we conclude that its volume and character created several of the very risks recognized long ago in the 1882 *Jackson* decision and reiterated in 2012 in *Anestal*. It required the defendant to meet charges of which the complaint (and in several instances the motion in limine) gave him no notice; it diverted the attention of the jury from the crime immediately before it; and, " by showing the defendant to have been a knave on other occasions, [it] creat[ed] a prejudice which may cause injustice to be done him." *Jackson*, 132

Mass. at 20-21. Accord *Anestal*, 463 Mass. at 665.

Moreover, in a case turning almost entirely on credibility, the prior bad acts evidence bolstered that of the victim. The jury were likely to have asked themselves why the victim would fabricate not just one, but numerous instances of forbidden contact by the defendant -- at least twenty-one instances, by the prosecutor's exaggerated count -- over a period of several years. See *Commonwealth v. Clark*, 23 Mass.App.Ct. 375, 381-382, 502 N.E.2d 564 (1987) (substantial risk of miscarriage of justice where erroneously admitted evidence enhanced complaining witness's credibility, which was " decisive issue"); *Commonwealth v. Giberti*, 51 Mass.App.Ct. 907, 909, 748 N.E.2d 982 (2001). Finally, counsel's failure to object was not a tactical decision; her opposition to the motion in limine and her request for a limiting instruction in the final charge show otherwise. We conclude that the combination of the acquittal evidence and other errors here created a substantial risk of a miscarriage of justice and that the defendant is entitled to a new trial.

3. *Other issues.*

The defendant argues that the judge abused his discretion by admitting the 209A order itself in evidence and by failing to require (even after the defendant and the Commonwealth had agreed on redactions) that certain assertedly prejudicial language be redacted before the order was shown to the jury. We see no abuse of discretion in the judge's admission of the order for impeachment purposes here. At any new trial, however, in the event that circumstances arise warranting the admission in evidence of the 209A order, the two standard preprinted sentences concerning a finding of " substantial likelihood of immediate danger of abuse" should be redacted, as set forth in *Commonwealth v. Reddy*, 85 Mass.App.Ct. 104, 105, 108-110, 5 N.E.3d 1254 (2014). See *id.* at 110, quoting from *Commonwealth v. Foreman*, 52 Mass.App.Ct. 510, 515, 755 N.E.2d 279 (2001) (reasoning that such language places a " 'judicial imprimatur' on the finding and on the victim's credibility").[24]

Judgment reversed.

Verdict set aside.

Vuono, Massing & Sacks, JJ.[25]

Notes:

[1]The defendant testified that the December 1 encounter occurred on a side street closer to his mother's house, on a route he commonly took during nightly walks. He further testified that the victim " insisted she wanted to talk . . . about the divorce [and] division of assets" and " threatened" that " if [he] didn't give her everything she wanted [he] would never see [his] children again." He claimed that the victim had " made up" her testimony concerning his alleged statement that " a restraining order is just a piece of paper."

[2]The defendant testified that he had never driven by either her boy friend's house or her mother's house while the restraining order was in effect.

[3]The defendant testified that he had not driven by the victim's mother's house on the evening of November 26, 2008, but had been followed by another car while driving on other roads. After being stopped by police near the center of Needham, and tried for violating the 209A order on that occasion, he had been " found not guilty." " We had our cell phone records. We could prove she was four towns away when I supposedly saw her. . . . I absolutely . . . was not there, and I was . . . found not guilty." The Commonwealth's brief on appeal acknowledges that the defendant was charged in connection with this incident and was acquitted at trial.

[4]The defendant's objections based on hearsay and other grounds unrelated to the issue on appeal need not detain us. The defendant is represented by new counsel on appeal.

[5]The judge denied the Commonwealth's motion, and allowed the defendant's, as to an incident that preceded issuance of the 209A order. The Commonwealth's motion in limine did not address the series of " maybe four" prior encounters on Cynthia Road testified to by the victim at trial.

[6]See note 3, *supra*. The defendant did not frame the objection as constitutionally-based and thus waived the objection by failing to renew it at trial. See note 9, *infra*.

[7]We do not agree with the Commonwealth that *Dorazio*, in stating that exclusion of acquittal evidence was required " in the circumstances of th[at] case," *id.* at 547, was confined to those circumstances. The court used more general terms, stating, " Our *holding* is limited to prior bad act evidence for which *a defendant* was acquitted" (emphasis added). *Id.* at 547 n.13.

[8]A defendant who seeks the benefit of a new constitutional

rule on direct review, but who did not preserve the issue at trial, is considered to have waived the issue and is entitled to review only for a substantial risk of a miscarriage of justice. See *Commonwealth v. Bowler*, 407 Mass. 304, 307-308, 553 N.E.2d 534 (1990); *Commonwealth v. Matsos*, 421 Mass. 391, 397-398, 657 N.E.2d 467 (1995). The defendant here concedes that this is the standard of review we should apply; he makes no argument that the " clairvoyance" exception to the waiver rule should apply. See, e.g., *Bowler*, 407 Mass. at 307. We need not decide whether *Dorazio* announced a " new rule," because, if it did not, the defendant here would still be entitled only to review for a substantial risk of a miscarriage of justice. See, e.g., *Commonwealth v. AdonSoto*, 475 Mass. 497, 504, 58 N.E.3d 305 (2016). Compare *Commonwealth v. Ennis*, 398 Mass. 170, 173-175, 497 N.E.2d 950 (1986).

[9]At the time of the trial in this case, a nonconstitutionally-based evidentiary argument made in connection with a motion in limine was required to be renewed by an objection at trial in order to preserve the issue for appeal. See *Commonwealth v. Whelton*, 428 Mass. 24, 25-26, 696 N.E.2d 540 (1998), overruled prospectively by *Commonwealth v. Grady*, 474 Mass. 715, 718-719, 54 N.E.3d 22 (2016). See also *Commonwealth v. Lacoy*, 90 Mass.App.Ct. 427, 441 n.21, 60 N.E.3d 354 (2016). Even under *Grady*, " Where what is being addressed and resolved at the motion in limine stage differs from what occurs at trial, the defendant still must object at trial to preserve his or her appellate rights." *Grady*, 474 Mass. at 720.

[10]" Before prior bad act evidence can be admitted against a defendant, the Commonwealth must satisfy the judge that 'the jury [could] reasonably conclude that the act occurred and that the defendant was the actor.'" *Commonwealth v. Leonard*, 428 Mass. 782, 785, 705 N.E.2d 247 (1999), quoting from *Huddleston v. United States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). See *Commonwealth v. Rosenthal*, 432 Mass. 124, 126-127 & n.4, 732 N.E.2d 278 (2000); Mass. G. Evid. § 104(b) (2016). " The Commonwealth need only show these facts by a preponderance of the evidence." *Leonard*, 428 Mass. at 785. See *Rosenthal*, 432 Mass. at 126-127 & n.4. Here, the judge's decision to admit the evidence implicitly imports a finding that it met these standards, and the defendant does not contend otherwise.

[11]As to the December 1, 2007, incident, although the victim stopped her car to initiate the conversation with the defendant, she testified that she did so only after seeing him at 1 a.m. along the side of the road near her boy friend's house, the general location of which the defendant acknowledged knowing.

[12]Nor were these prior incidents so remote in time as to make them inadmissible. " There is no bright-line test for determining temporal remoteness of evidence of prior misconduct. Where the prior misconduct is merely one instance in a continuing course of related events, the allowable time period is greater." *Helfant*, 398 Mass. at 228 n.13.

[13]Our analysis also focuses, *infra*, on the lack of contemporaneous limiting instructions and the adequacy of the final instruction on prior bad acts.

[14]While it is conceivable that these instances were what the prosecution's motion in limine referred to as the " [s]everal other instances occurr[ing] in 2007 and 2008," the manner in which these instances arose in the victim's testimony suggests otherwise. The prosecutor never asked her about them in the course of systematically eliciting the chronology of the defendant's prior bad acts; rather, she volunteered them in relation to her description of the charged incident.

[15]In the end -- given the lack of dates, together with the victim's explanation for not having called the police -- the defendant did not and perhaps could not respond to the victim's testimony about the series of late 2007 to early 2008 incidents, except by declaring that he had never driven by either her boy friend's house or her mother's house at any time when the restraining order was in effect.

[16]Compare *Commonwealth v. Holley*, 476 Mass. 114, 123-124, 64 N.E.3d 1275 (2016) (prior bad acts evidence did not " overwhelm[ ]" case, given ample forensic, consciousness-of-guilt, and other evidence that defendant was perpetrator).

[17]The judge's full instruction, patterned on Criminal Model Jury Instructions for Use in the District Court 6.720 (rev. 2011), was as follows:

> " [T]he Commonwealth must prove that the defendant's contact was not a good faith attempt by the defendant to do that which was permitted.
>
> " Now, in deciding this, whether there was any contact which violated the abuse prevention order, you may consider any evidence relevant to the nature and purpose of any contact, the number of contacts over time, the length of any contact, and the substance and character of any statements made during any of that contact.
>
> " You should consider all of the evidence in this case to decide whether any contact was made in good faith for a legitimate reason or whether that reason was merely a pretext or excuse for contacting the protected party."

[18]The judge instructed:

> " The alleged conduct which is the subject of this complaint is that contact in September of 2010. I guess September 7.
>
> " Now, there's a lot of other contact alleged, activity alleged, and that activity prior to that date, September 7th of 2010, you may not use any of that contact. And obviously it's your decision how much of that you find as a matter of fact. But you may not use that contact, that prior contact, that prior activity, you may not use that as a propensity or use it to show a propensity by

the defendant to commit the crime charged here.

" But you may use it for other reasons having to do with, particularly in this case, having to do with the two issues I talked about just prior to talking about this, and that is whether it was inadvertent or accidental contact, motive for testifying, motive for that contact, those sorts of things. But again you may not use it to show a propensity for the defendant to commit the crime charged here."

[19]The model instruction, in contrast, reads as follows:

" The defendant is not charged with committing any crime other than the charge(s) contained in the complaint. You have heard mention of other acts allegedly done by the defendant. You may not take that as a substitute for proof that the defendant committed the crime(s) charged. Nor may you consider it as proof that the defendant has a criminal personality or bad character.

" But you may consider it solely on the limited issue of [e.g. whether the defendant acted intentionally and not out of accident or other innocent reason].

" You may not consider this evidence for any other purpose. Specifically, you may not use it to conclude that if the defendant committed the other act(s), he (she) must also have committed (this charge) (these charges)."

Criminal Model Jury Instructions for Use in the District Court 3.760 (2009).

[20]The instruction also gave only passing attention to whether the jury, before considering what effect to give the prior bad acts, should determine the hotly contested issue whether those acts had occurred at all in the manner alleged. Compare *Helfant*, 398 Mass. at 226 & n.9 (judge instructed jury not to consider prior bad acts testimony unless they believed it). In fairness to the judge, such language is not part of the model prior bad acts instruction, see note 19, *supra*, but it would have been especially helpful here, where there was so much contested prior bad acts evidence, and the potential for it to " overwhelm" the evidence of the charged act was so great. Compare *Dwyer*, 448 Mass. at 128-129 (bad acts evidence " overwhelmed" evidence of charged conduct); *Roche*, 44 Mass.App.Ct. at 380 (" Even if the evidence is relevant, a judge must guard against the danger of overwhelming a case with such bad act evidence").

[21]We do not suggest that there was only one " reasonable alternative[ ]" here. See *L.L.*, 470 Mass. at 185 n.27. The judge might have excluded the evidence altogether, substantially limited its volume, or excluded evidence (such as the series of alleged 2007-2008 encounters) that was so indefinite as to be especially prejudicial. The judge could also have given contemporaneous and final limiting instructions providing more guidance to the jury.

[22]See *Dorazio*, 472 Mass. at 546, quoting from *Dowling v. United States*, 493 U.S. 342, 361-362, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (Brennan, J., dissenting) (" [T]he fact that the defendant is forced to relitigate his participation in a prior criminal offense under a low standard of proof combined with the inherently prejudicial nature of such evidence increases the risk that the jury erroneously will convict the defendant of the presently charged offense").

[23]Although the defendant denied any contact with the victim on November 26, 2008, he did acknowledge that he was stopped by the police. See note 3, *supra*. The other such incident was the one occurring on December 1, 2007, where the defendant testified there had been contact with the victim.

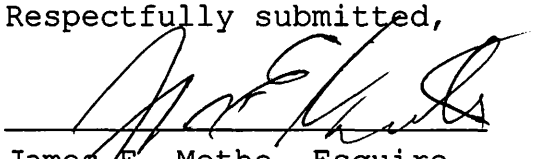
[24]We also leave for any new trial the defendant's argument that the notations reflecting the repeated extensions of the 209A order should have been redacted. Absent an appropriate stipulation, portions of those notations, while perhaps placing a similar imprimatur on the victim's credibility, might also be necessary to establish that the order was in effect on the date that the violation allegedly occurred. *Reddy*, 85 Mass.App.Ct. at 109. Whether and what portions of such notations should be redacted are matters for the trial judge's discretion.

[25]The panelists are listed in order of seniority.

CERTIFICATE OF COMPLIANCE

I, James E. Methe, counsel for Rowen Lowery, hereby certify, in accordance with Mass. R. App. P. 16(k), that this brief complies with Mass. R. App. P. 20(a). Compliance with the length limit of Mass. R. App. P. 20 (a)(2)(A) was ascertained by using Courier New font, 12 point, 10 characters per inch, and the brief is less than fifty pages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, JAMES E. METHE, do hereby certify that I made service of the Defendant's Brief and Appendix, on this date, to ADA Lindsay Russell, Middlesex County District Attorney's Office, 15 Commonwealth Avenue, Woburn, MA, 01901, electronically, at lindsay.russell@state.ma.us.

Dated: June 22, 2020

James E. Methe, Esquire